

UNITED STATES OF AMERICA
UNITED STATES COAST GUARD vs.
MERCHANT MARINER'S DOCUMENT
Issued to: Terry R. GARD Z-348 44 3202

DECISION OF THE VICE COMMANDANT ON APPEAL
UNITED STATES COAST GUARD

2200

Terry R. GARD

This appeal has been taken in accordance with Title 46 U.S.C. 239(G) and 46 CFR 5.30-1.

By order rendered 2 March 1979, an Administrative Law Judge of the United States Coast Guard at St. Louis, Missouri, suspended Appellant's seaman's documents for one month on six months' probation, upon finding him guilty of negligence. The specification found proved alleged that while serving that while serving as Tankerman on board the Tank Barge NMS-3103 under authority of the document above captioned, on or about 21 August 1978, Appellant failed to adequately supervise cargo loading operations, causing an overflow and pollution of the navigable waters of the upper Mississippi River near Pine Bend, Minnesota.

The hearing was held at St. Louis, Missouri, on 2 January and 2 March 1979.

At the hearing, Appellant was represented by non-professional counsel. A plea of not guilty to the charge and specification was entered in his behalf by the Administrative Law Judge.

The Investigating Officer introduced in evidence depositions of one witness, and three exhibits.

Appellant offered no evidence in defense.

At the end of the hearing, the Administrative Law Judge rendered an oral decision in which he concluded that the charge and specification had been proved. He then entered an order suspending all documents issued to Appellant for a period of one month on six months' probation.

The entire decision was served on 19 April 1979. Appeal was timely filed on 19 March 1979 and perfected on the same day.

FINDING OF FACT

On 21 August 1978, Appellant was serving as Tankerman on board

the Tank Barge NMS-3103 and acting under authority of his document while the vessel was loading cargo at Koch Refinery, Pine Bend, Minnesota. At all pertinent times Appellant was acting as person in charge of T/B NMS-3103 with respect to loading operations. On the date in question, at approximately 4:55 A.M., asphalt spilled out of the forward hatches of the barge and found its way into the Mississippi River.

BASES OF APPEAL

This appeal has been taken from the order imposed by the Administrative Law Judge. It is urged that various procedural errors warrant reversal with prejudice. Due to my disposition of this case enumeration of the grounds raised is unnecessary.

APPEARANCE: Mr. W. Ken Elkins of National Marine Services, Inc., St. Louis, Missouri, purported to act for Appellant.

OPINION

I

Testimony as to the circumstances surrounding the occurrence consisted primarily of two depositions of Mr. Darrell J. Musech, an employee of Koch Refinery who was present on the dock the morning of the incident. Mr. Musech did not witness the actual incident and could not state, other than through sheer conjecture, the cause of the discharge. No documentation appears in the record relative to the first deposition other than the deposition itself.

Appellant received proper notice of hearing, initially scheduled for 3 January 1979. A change of venue occurred, purportedly on motion by Appellant, with a continuance to 2 February. No supporting motion or order appears in the record. The hearing was conducted in absentia, with a lay counsel purporting to represent Appellant. Lay provided no documentary evidence of his authority to act in Appellant's behalf.

II

Procedurally, this record is totally inadequate. Two depositions constitute the whole of the substantive material, yet neither was taken in accordance with explicit and detailed regulations concerned with use of such evidence. 46 CFR 5.20-135,140. Nowhere does it appear of record that Appellant was ever apprised of the fact that the Coast Guard intended to take a deposition prior to the hearing. Neither does it appear that good cause was shown for taking deposition. The regulations of an

administrative agency are binding on that agency even if the regulations require the agency to give more than the minimum constitutional protections. Failure to abide by the regulations is reversible error.

I also note that the record is devoid of any affidavit, signed statement, or sworn testimony which would justify the acceptance of Mr. Elkins to act in behalf on the absent Appellant. This is particularly true with respect to prosecution of an appeal. It is not appropriate for an Administrative Law Judge to fail to make record of an individual's authority to act on behalf of another in R.S. 4450 proceedings. Such authority must appear in the record proceedings.

The record is also deficient in the absence of documentation reflecting the change of venue, in the form of the motion which raised the issue, and the order which established the change. Absent such material, the record fails to show that adequate notice of hearing, sufficient to afford due process to Appellant, was given. This is of critical importance given the in absentia nature of the hearing and the lack of persuasive authority for a lay counsel to represent Appellant.

I note parenthetically that the apparent lack of authority for Mr. Elkins to act in behalf of Appellant might at first blush obviate the need to consider this appeal. After due consideration I have determined that this record, and the proceedings it reflects are of sufficient concern that the issues posed must be resolved, and for purposes of considering this case on the merits, the notice of appeal filed by Mr. Elkins will be considered effective.

III

The fundamental principle governing determinations of negligence in the case of a discharge of oil may briefly be stated: the mere fact of a discharge does not prove the negligence of the person in charge. See Appeal Decisions Nos. 2075, 2054, and 2013. The depositions in this case, considered arguendo, merely prove the occurrence of a spill. Negligence implies, of necessity, a failure to exercise reasonable care under the circumstances. Conclusions by the deponent that Appellant must have been negligent do not rise to the dignity of substantial evidence of a reliable and probative character required in these proceedings to meet the government's burden of proof.

CONCLUSION

For the foregoing reasons, the record is deficient on both procedural and substantive grounds. While the procedural niceties

might be respected might be respected if a remand was ordered, it is clear that further testimony of the one available witness could not supply the reason for the occurrence of the discharge. It thus appears that no purpose would be served by requiring the Appellant to respond to this charge again.

ORDER

The order of the Administrative Law Judge dated at St. Louis, Missouri, on 7th March 1979, is VACATED, and the charge DISMISSED.

R. H. SCARBOROUGH
Vice Admiral, U.S. Coast Guard
Vice Commandant

Signed at Washington, D. C., this 8th day of April 1980.